

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

**KeySpan Energy Delivery New England)
Petition for Approval of Firm)
Transportation and Related Agreements)
with TransCanada Pipelines Limited and)
Union Gas Limited)**

D.T.E. 05-40

**INITIAL BRIEF OF
THE ATTORNEY GENERAL**

Respectfully submitted,

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September 30, 2005

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I. INTRODUCTION

This case concerns a Petition (“Petition”) by Boston Gas Company (“Boston Gas”), Colonial Gas Company (“Colonial”) and Essex Gas Company (“Essex”) (together, the “Companies”), operating as KeySpan Energy Delivery New England (“KeySpan” or the “Company”), for Department approval of a series of firm transportation and related agreements with TransCanada Pipelines Limited (“TransCanada”) and Union Gas Limited (“Union”).

II. PROCEDURAL HISTORY

On May 23, 2005, KeySpan filed a Petition for Approval of Firm Transportation and Related Agreements with TransCanada Pipelines and Union Gas Limited. On July 6, 2005, the Department conducted a public hearing and a procedural conference to establish a schedule for discovery, hearings and briefs.

The Department conducted an evidentiary hearing on September 20, 2005. During the evidentiary hearing, KeySpan presented two witnesses to testify in support of its proposal, Theodore Poe, Jr., Manager of Energy Planning, and John E. Allocca, Director of Contracts in KeySpan’s Energy Transactions Division.

III. THE COMPANY'S PROPOSAL

KeySpan is seeking Department approval of 15 firm transportation and related agreements with TransCanada and Union. Exh. KEDNE-1, Exh. JEA- through Exh. JEA 15.¹ Under these transportation contracts, Union will transport gas from Dawn, Ontario to an interconnection with TransCanada known as Parkway, and then transport the gas from Parkway to Waddington, New York. Exh. KEDNE-1 at 5-6.

TransCanada and Union must construct new facilities in order to meet the demands of these contracts. *Id.* at 6. Construction of the new facilities requires regulatory approval by the Department and by Canadian authorities. *Id.* at 12. KeySpan faces the potential risk that the TransCanada and Union cannot complete their construction projects because either KeySpan or TransCanada might fail to receive the necessary regulatory approval or TransCanada might fail to perform its obligations. *Id.* at 10-12. The maximum potential liability for KeySpan, and its ratepayers, is \$5.7 million. Tr. at 14.

The greatest potential financial risk for KeySpan ratepayers is defined by the terms of the cost sharing agreement between KeySpan and TransCanada.² The cost sharing agreement contains terms that require KeySpan to pay a portion of costs if the construction project is cancelled for reasons outside of KeySpan's control or discretion. Tr. at 14. This is unlike any other contract that the Department has approved. Although the Department has approved

¹Each of KeySpan's affiliates, Boston Gas Company, Essex Gas Company, and Colonial Gas Company, signed the following agreements: a Firm Transportation Contract with Union, a Financial Backstopping Agreement with Union, a Precedent Agreement with TransCanada, a Financial Assurances Agreement with TransCanada, and a Cost Sharing Agreement with TransCanada.

²The Department determined the specific terms of the cost sharing agreement confidential. The Company witness, however, discussed the general terms of the agreement and the potential risk involved.

company contracts that include financial liabilities similar to those in the proposed agreement (See Exh. AG-1-12), none of those contracts contain terms that would make the company financially liable to a pipeline for events outside of its control or discretion or because of nonperformance of third parties. Tr. at 17.

IV. STANDARD OF REVIEW

In evaluating a gas utility's resource options for the acquisition of commodity resources and capacity under G.L. c. 164, § 94A ("Section 94A"), the Department examines whether the acquisition of the resource is consistent with the public interest. *Berkshire Gas Company*, D.T.E. 04-47 at 19 (2004), *citing Commonwealth Gas Company*, D.P.U. 94-174-A at 27 (1996). In order to demonstrate that the proposed acquisition of a resource is consistent with the public interest, a company must show that the acquisition (1) is consistent with the company's portfolio objectives and (2) compares favorably to the range of alternative options reasonably available to the company and its customers, including releasing capacity to customers migrating to transportation, at the time of the acquisition or contract negotiation. *Berkshire Gas Company*, D.T.E. 04-47 at 19 (2004), *citing Commonwealth Gas Company*, D.P.U. 94-174-A at 27 (1996).

To establish that a resource is consistent with a company's portfolio objectives, the company may refer to the portfolio objectives established in a recently approved forecast and requirements plan or in a recent review of supply contracts under Section 94A, or may describe its objectives in the filing accompanying the resource proposal. *Id.* at 19-20. In comparing the proposed resource acquisition to current market offerings, the Department examines relevant price and non-price attributes of each contract to ensure a contribution to the strength of the overall supply portfolio. The Department also considers whether the pricing terms are

competitive with those of the broad range of capacity, storage, and commodity options that were available to the company at the time of the acquisition, as well as those opportunities that were available to other companies in the region. *Id.* at 20. In addition, the Department determines whether the acquisition satisfies the company's non-price objectives, including, but not limited to, flexibility of nominations and reliability and diversity of supplies. *Id.*

V. ARGUMENT

This contract, unlike any other transportation contract the Department has approved, exposes KeySpan's ratepayers to millions of dollars of financial risk arising from events out of the Company's control. The Department should not approve the contract unless customers are held harmless for these losses.

As part of the Precedent Agreement, KeySpan agrees that, upon an Event of Cancellation,³ it will bear all of "the risk of all reasonably incurred financial obligations and outlays in connection with TransCanada's efforts" to bring the pipeline on line. Exh. JEA-7. This includes events that could occur that are beyond the control of the Company. Tr. at 14-15. The Company's witness confirmed that it has to pay "sunk costs," or internal labor costs, if it withdraws from the agreement. Tr. at 25. TransCanada, however, has no financial liability to KeySpan if TransCanada terminates the agreement. Tr. at 24. The penalties are one-sided, to the detriment of KeySpan's customers.

³ "Event of Cancellation" is defined in the contract as either 1) any declaration of an Event of Cancellation made in accordance with the terms and conditions of the Precedent Agreement or 2) KeySpan withdrawing its request for the Requested Service at any time prior to the execution of the Firm Transportation Service Contract. Exh. JEA-7, paragraph 1 (e). If at any time TransCanada is of the opinion that any of the parties' requirements will not be satisfied, TransCanada may, in its sole discretion, declare an Event of Cancellation. *Id.*, paragraph 11 (b).

If the Department approves the Company's Petition, KeySpan's maximum exposure under the contracts is \$5.7 million. Tr. at 14. KeySpan's shareholders should bear this risk, especially when the language of the contracts gives TransCanada sole discretion to determine when an event is considered an Event of Cancellation. Exh. JEA-7, paragraph 11 (b). In addition, if the Department approves the Company's Petition, other vendors will seek the same type of arrangements from all natural gas utilities. The utilities will then have less ability to negotiate for better contracts for their customers, so the risk of these contracts will shift from the Company to the customers.

Finally, if the Department approves the Company's Petition, the Attorney General reserves his right to challenge the prudence and usefulness of any costs the Company might seek to recover from customers in the event of cancellation. *See Consumers Organization for Fair Energy Equity v. D.P.U.*, 368 Mass. 599 (1975); *Boston Gas Company*, D.P.U. 93-60 at 24-25 (1993); *Attorney General v. Department of Telecommunications and Energy*, 438 Mass. 256, 264 n.13 (2002).

VI. CONCLUSION

For these reasons, the Department should reject the Company's Petition.

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